

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ARKEMA INC, a Pennsylvania Corporation,  
and GENERAL METALS OF TACOMA,  
INC., a Washington Corporation,

Plaintiffs,

v.

ASARCO, INC., a New Jersey Corporation;  
et. al,

Defendants.

Case No. C05-5087 RBL

ORDER DENYING PLAINTIFFS'  
MOTION TO COMPEL DISCOVERY

THIS MATTER is before the Court upon Plaintiffs' Motion to Compel discovery from Weyerhaeuser and Motion to Compel Discovery and find non-party Manke Lumber Company in contempt. Plaintiffs seek to have this Court compel both parties to produce all documents that were submitted in the "Wood Debris Group" (WDG) arbitration. Plaintiffs also seek an Order of Contempt against Manke Lumber for failing to object or seek a protective order prior to the deposition of Manke Lumber's records custodian. The Court, for the reasons stated below, denies the Motions to Compel discovery from both Weyerhaeuser and Manke and denies the Motion to find non-party Manke in Contempt.

**I. Relevant Facts**

In 1997, Manke Lumber Company, Weyerhaeuser, and Louisiana-Pacific entered into a "Wood Debris Group" Agreement. The WDG Agreement provided for the sharing of costs during the investigation and remediation of wood debris contamination in the Neck and Upper Turning Basin (UTB) of the Hylebos Waterway in Tacoma. The work was done pursuant to an Agreed Order with Ecology under the Washington Model Toxics Control Act (MTCA). [Ex.4 to Ashcroft Decl. ¶[1, 4]. The Agreement contains a confidentiality

1 provision regarding “information developed, generated, or otherwise produced in connection with this  
2 Agreement.” [Dkt. #153, Ashcroft Decl. Ex. 4, ¶11]. The provision also states, “[i]t is agreed that the matters  
3 undertaken by the parties with respect to the Hylebos Waterway are undertaken as, and are intended to  
4 constitute, a joint defense in anticipation of litigation which could be expected with respect to this site . . .”  
5 [Id.] The WDG parties worked together for over four years investigating wood debris in the Hylebos and  
6 developing a Cleanup Study Report. However, they were unable to agree to on how to allocate their individual  
7 shares of the investigation costs. [Dkt. #154, Weyerhaeuser Response, 4:8-11]. Pursuant to their agreement,  
8 the parties submitted their dispute to arbitration which was conducted in June of 2002. [Dkt. #154, Hughes  
9 Decl., Ex. 1, ¶7].

10 In the current case, Plaintiffs sent discovery requests seeking various documents from Weyerhaeuser.  
11 As part of its response Weyerhaeuser produced a privilege log, referencing exhibits, deposition transcripts, and  
12 documents produced by the parties for the arbitration proceeding. [Dkt. #153, Ashcroft Decl., Ex. 1].  
13 Weyerhaeuser claims the work product immunity and joint defense privilege as the bases for refusing to  
14 produce these documents. [Id.]

15 Manke Lumber is a not a party to the instant litigation. Plaintiffs sent a subpoena duces tecum to  
16 Manke on May 16, 2006, seeking all the documents produced in the WDG arbitration and scheduling a  
17 deposition for May 26, 2006. [Plaintiff Motion, 3:8-9]. Manke’s designated records custodian testified at the  
18 deposition that Manke was withholding the documents because of the confidentiality agreement among WDG  
19 group and the confidentiality agreement related to the arbitration. [Ashcroft Decl., Ex. 3].

20 Plaintiff held discovery conferences with both Weyerhaeuser and Manke subsequent to the deposition.  
21 Weyerhaeuser did not change its position, but Manke did agree to produce all business-related documents  
22 submitted by Manke during the arbitration. [Dkt. #152, Plaintiff Motion, 3:18-21].

## 23 **II. Motion to Compel Discovery from Weyerhaeuser**

### 24 **A. Privilege Claims**

25 The burden of demonstrating the existence of an evidentiary privilege for discovery purposes rests  
26 on the party asserting the privilege. *Samuels v. Mitchell*, 155 F.R.D. 195, 197 (N.D. Cal. 1994). The joint  
27 defense privilege is an exception to the general rule that the attorney-client privilege is waived when  
28

1 privileged information is disclosed to a third party. *U.S. v. Agnello*, 135 F. Supp. 2d. 380, 382 (E.D.N.Y.  
2 2001). This privilege is meant to recognize the advantage of, or even the necessity for, an exchange or  
3 pooling of information between attorneys representing parties sharing a common interest in litigation,  
4 actual or prospective. *Schacher v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 192  
5 (N.D. Ill. 1985). Weyerhaeuser and Manke both assert the joint defense privilege with respect to the  
6 documents at issue in this motion.  
7

8 All parties agree that a joint defense privilege is formed when three elements are met: “1) the  
9 communications were made in the course of joint defense effort; 2) the statements were designed to further  
10 the joint defense effort; and 3) the privilege has not been waived.” *Durkin v. Shields (In Re Imperial Corp.*  
11 *of Am.)*, 167 F.R.D. 447, 455 (S.D. Cal. 1995). The WDG Agreement clearly states that the parties  
12 involved were working together in a joint defense effort, “in anticipation of litigation,” in order to allocate  
13 costs among themselves. The arbitration provision states, “[i]n the event that the parties are unable to  
14 decide on the final allocation, they agree to submit the final allocation of the costs covered by this  
15 Agreement to binding arbitration.” [Ashcroft Dec., Ex. 4, ¶9].  
16  
17

18 Plaintiff asserts that the WDG arbitration was an adversarial effort on each of the parties’ part to  
19 shift more of the costs to the other parties, and thus was a waiver of the joint defense privilege. [Dkt.#156,  
20 Plaintiff Motion, 3]. Yet the arbitration was just one of many steps taken by all three parties to come to a  
21 final agreement as to the allocation of the costs, and statements made during the arbitration were actually  
22 designed to further their joint defense effort. This arbitration was part of their “on-going and joint effort to  
23 set up a common defense strategy.” *Griffith v. Davis*, 161 F.R.D. 687 (C.D. Cal. 1998). The joint defense  
24 privilege is not limited to situations in which the positions of the parties are compatible in all respects.  
25 *United States v. McPartlin*, 595 F.2d 321, (7<sup>th</sup> Cir. 1979) (citing the Advisory Committee’s Note to  
26 proposed Rule 503(b) of the Federal Rules of Evidence).  
27  
28

1        There is a strong public interest in preserving the confidentiality of settlement or arbitration  
2 proceedings, but this must be balanced with the public and private interest in affording a litigant the  
3 opportunity to broadly discover information in support of its case. *Hasbrouck v. BankAmerica Housing*  
4 *Services*, 187 F.R.D. 453, 459 (N.D.N.Y. 1999). Especially in the context of environmental litigation,  
5 public policy supports encouraging settlement out of court as a more efficient solution to this heavily  
6 litigated area of law. Parties in this case maintained their common interest of determining division of  
7 cleanup costs among themselves and did not meet “purely on an adversary basis.” *United States v.*  
8 *McPartlin*, 595 F.2d 1321, 1336 (7<sup>th</sup> Cir. 1979). This type of disclosure to parties with a common interest  
9 or “friendly litigants” is not sufficient to waive the joint defense privilege. *Western Fuels Association, Inc.*  
10 *v. Burlington Northern Railroad Company*, 102 F.R.D. 201, 203 (D. Wyo. 1984).

13        **B.        Plaintiffs Have Not Demonstrated a Compelling Need for the Arbitration Materials**

14        The Court is not persuaded by the Plaintiffs’ judicial estoppel argument that this information is  
15 discoverable in order to prevent Defendants from taking inconsistent positions in the arbitration and this  
16 lawsuit. Defendants have produced the findings of the arbitrator which state both the arguments of all  
17 parties involved and the final conclusions of the proceeding.

19        **III.        Motion to Compel Discovery and Find Non-Party Manke Lumber in Contempt**

20        Manke argues that Plaintiffs failed to comply with the requirements of Rule 45 in serving the  
21 subpoena and that Manke fulfilled its duties under Rule 45(c) and (d). Alternatively, Manke asserts that it  
22 has provided an “adequate excuse” as required by Rule 45(e). Plaintiffs assert that because Manke  
23 objected orally to document production at 1:32 p.m. rather than before 1:30 p.m. on the day of the  
24 deposition, Manke failed to object in written form “before the time specified for compliance,” and thus  
25 waived its privilege claim. Fed. R. Civ. P. 45(c)(2)(B).

27        Plaintiffs in their Reply urge the court not to “elevate form over substance” in the absence of  
28

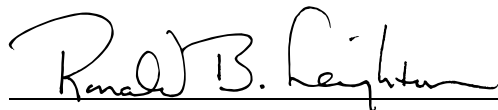
1 showing real prejudice. [Dkt. #152, Plaintiff Reply, 5:11-12]. The Court heeds this advice and finds that  
2 the parties' squabble over form is not dispositive in this instance. Because Manke did object, and the joint  
3 defense privilege does exist regarding documents produced for the arbitration, the Court shall not require  
4 Manke to produce privileged documents to the Plaintiffs.  
5

6 **IV. Conclusion**

7 The Court finds that a joint defense privilege does exist for the documents referenced in the  
8 privilege log produced for the arbitration and therefore the Plaintiffs' Motion to Compel discovery from  
9 Weyerhaeuser is DENIED. The Court also DENIES both Plaintiffs Motion to Compel discovery from  
10 Manke Lumber Company and the Motion to find non-party Manke Lumber Company in Contempt.  
11

12 IT IS SO ORDERED.

13 Dated this 27<sup>th</sup> day of June, 2006.  
14  
15

16 

17 RONALD B. LEIGHTON  
18 UNITED STATES DISTRICT JUDGE  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28